APPX. 1
APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

U.S. FOR THE ELEVENTH CIRCUIT

No.02-11918
Non-Argument Calendar

D.C. Docket No. 00-00028-CRT-OCR-10

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TERRY WAYNE ALLEN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(November 26, 2002)

Before DUBINA, MARCUS and FAY, Circuit Judges.

PER CURIAM:

APPX. 2

Terry Wayne Allen, a federal prisoner, appeals his conviction and sentence for conspiracy to distribute marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(l). On appeal, Allen raises five issues. He alleges that the magistrate judge erroneously disqualified his first retained counsel. Allen also maintains that the superceding indictment did not relate back to the original indictment and, thus, was barred by the statute of limitations. Next, Allen contends that the evidence presented at trial was insufficient to sustain the jury's forfeiture verdict. Fourth, Allen asserts that the forfeiture verdict was a nullity in light of his contention that the superceding indictment was untimely. Finally, Allen argues that a material variance existed between the indictment and the government's evidence at trial. For the reasons set forth more fully below, we affirm Allen's conviction and sentence.

Allen was indicted on July 19, 2000, for conspiracy to distribute more than 100 kilograms of marijuana, in violation of §§ 846 and 841(a)(l). According to the indictment. Allen participated in the conspiracy from 1989 through August 29, 1995. The indictment's forfeiture provision notified Allen that the government sought to forfeit his interest in property that was used to facilitate the offense, including, but not limited to, "[r]eal property, its buildings, appurtenances and improvements thereon, located at 29323 E. State Road 44, Eustis, Lake County, Florida."

On January 17, 2001, the grand jury returned a superceding indictment, reasserting that, Allen engaged in a marijuana conspiracy from 1989 through August 29, 1995, and newly alleging that the conspiracy involved 1,000 kilograms or more of marijuana. The forfeiture provision reiterated the language from the original indictment and added that the government sought to forfeit $600,000 in narcotics proceeds and Allen's rights under a Prior to trial, the government moved to disqualify Allen's retained counsel,

Harrison T. Slaughter, Jr., alleging that Slaughter labored under a conflict of interest because it was likely, that he would be called to testify at trial as a defense witness. The government alleged, in the alternative, that Slaughter must be disqualified because he had first-hand knowledge of events presented at trial and, therefore, could assume the role of an unsworn witness. After conducting an evidentiary hearing, the magistrate judge entered an order disqualifying Slaughter. Allen retained another attorney.

During trial, co-conspirator Michael Baxley testified that he began working for Allen in 1989 in Allen's land clearing business. In that same year, Baxley also became involved in Allen's marijuana business and started to receive "small amounts" of marijuana from Allen. In the early 1990's, Allen supplied Baxley with five and ten pound quantities for Baxley to distribute, and they shared the proceeds. Between 1990 and 1993, Baxley and Allen received marijuana shipments from Mexico and Texas, delivered by Rolando and Poncho Siller. They retrieved 50 to 80 pounds of marijuana from the Sillers on several occasions. In 1992 and 1993, Allen supplied Baxley with 15 to 20 pounds of marijuana per week. During this period. Allen supplied marijuana to individuals named Norman Hickman, Michael Stephens, Bobby Sherman, Keimy, and Digum Dan. In early 1994, the Sillers provided Baxley and Allen biweekly shipments of 475 to 500 pounds of marijuana. In late 1994, the Sillers stopped sending marijuana, and the partnership between Baxley and Allen began to "break away." Allen and Baxley continued to receive marijuana from people within the Sillers' organization, Allen using co-conspirator Luis Delgado as his source, and Baxley using an individual named Chuy. From late 1994 into 1995, Allen supplied Baxley with 10 to 20 pounds of marijuana on several occasions. Baxley further testified that, during the period alleged in the indictment, he witnessed Allen (1) transport quantities of marijuana to his State Road 44

residence to prepare it for delivery on several occasions; (2) store between $80,000 and $100,000 in drug proceeds at that residence; and (3) store marijuana in a swamp buggy on the property on several occasions. On one occasion. Allen stored from 50 to 100 pounds of marijuana in the shed behind the house on the State Road 44 property. Also, a tractor-trailer delivered marijuana to Allen's State Road 44 residence on one occasion. During Baxley's testimony, the jury listened to a telephone conversation occurring on August 15,1995, during which Allen agreed to sell Baxley between 7 and 15 pounds of marijuana for distribution to one of Baxley's customers. Baxley did not recall if Allen in fact ended up supplying him with the marijuana. Also, on August 29, Allen agreed to sell Baxley ten pounds of marijuana. The jury also listened to September 1995 conversations in which Baxley and Allen discussed how the police caught them, and Allen stated that he may need a witness to state that he did not smoke marijuana.

Co-conspirator Michael Stephens testified that he began cultivating marijuana plants with Baxley and Allen in 1992. Stephens distributed between 50 and 130 pounds of marijuana for Baxley and Allen from 1992 through 1993. Co-conspirator Norman Hickman testified that he began purchasing marijuana from Allen in 1994. Allen supplied Hickman with approximately 20 pounds of marijuana every week or two. Hickman normally received the marijuana at Allen's State Road 44 residence, and he saw Baxley's supplier, Chuy, at the residence on two occasions. On one of those occasions, Hickman received 50 pounds of marijuana from Chuy. On several occasions, Hickman delivered approximately $20,000 in drug proceeds to Allen's State Road 44 residence. On one occasion, Allen and his wife counted $50,000 in drug proceeds on the kitchen table. Hickman stated that he received marijuana from Baxley on one occasion. Hickman estimated that he distributed between 300 and 400 pounds of marijuana from January 1994 through October 1994.

Co-conspirator Luis Delgado testified that, on two occasions in 1993 or 1994, he picked up money from Allen at the State Road 44 residence and delivered it to Carlos Siller. In 1994 or 1995, Delgado delivered 100 pounds of marijuana to Allen at the State Road 44 residence. In August 1995, four or five days before Allen's arrest, Delgado delivered an additional 50 pounds of marijuana to Allen at his State Road 44 residence. At that time. Allen owed Delgado $60,000. A few days after Allen was released on bond, Delgado visited Allen at his residence to collect the money.

At the conclusion of the government's case, Allen moved for a judgment of acquittal, arguing that (1) the evidence established multiple conspiracies; and (2) the superceding indictment was time-barred. The district court denied the motion. Thereafter, the jury found Allen guilty as charged of conspiracy to distribute marijuana and, in a separate verdict, found that Allen should forfeit $220,000 in drug proceeds and his interest in the State Road 44 property, including all buildings and appurtenances thereon. The jury clarified that the State Road 44 property should be forfeited because it facilitated the offense.

Allen filed a "Renewed Motion for Judgment of Acquittal or in the Alternative for a New Trial," reiterating that the evidence established multiple conspiracies, and newly alleging that the district court's disqualification of Slaughter was erroneous. Allen also argued for the first time that the superceding indictment was time-barred in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The district court denied the motion.

The presentence investigation report recommended a base offense level of 32, pursuant to U.S.S.G. § 2Dl.l(a)(3), because-the offense involved between 1,000 and 3,000 kilograms of marijuana. The probation officer also noted that Allen faced a maximum possible sentence of life

imprisonment, pursuant to § 841(b)(l)(A), based on his 1988 convictions for possession and cultivation of marijuana. Finally, in determining Allen's net worth, the probation officer found that Allen's equity in the State Road 44 residence and 23-acre homesite was $260,000. The district court sentenced Allen, in accordance with § 841(b)(l)(A), to 20 years' imprisonment and 10 years' supervised release. The court also ordered that Allen forfeit to the United States $220,000 in drug proceeds and the State Road 44 property.

Allen argues on appeal that the magistrate judge erroneously disqualified his first retained counsel. "A [district court] judge may designate a magistrate judge to hear and determine any pre-trial matter pending before the court .. .and may reconsider any pretrial matter ... where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(l)(A). It is well-established that appeals from a magistrate's, pre-trial ruling must be to the district court. See United States v. Brown. 299 F.3d 1252, 1260 (11th Cir. 2002) (stating that the rule is jurisdictional and not subject to equitable exceptions); United States v. Renfro. 620 F.2d 497, 500 (5th Cir.), cert. denied. 449 U.S. 921 (1980). The defendant in Renfro filed a pre-trial discovery motion, which the magistrate denied. Renfro. 620 F.2d at 499-500. The defendant failed to appeal the magistrate's order to the district court and first raised the possibility that the magistrate erred in a post-trial motion. Id. at 500. On appeal, we concluded that we lacked jurisdiction to review the magistrate's order because, "[i]n essence then, defendant is now appealing a magistrate's decision directly to
this Court.". Id. Significantly, we stated that, although the defendant appealed the magistrate's ruling to the district court, his failure to do so until after trial deprived the trial judge of his ability to effectively review the magistrate's holding. Id.

This case is indistinguishable from Renfro. Similar to

challenged the magistrate's order disqualifying his retained counsel in a post-trial motion. Also, similar to the evidentiary motion at issue in Renfro, the motion to disqualify Allen's retained counsel was a pre-trial motion, the adjudication of which was necessary to proceed to trial. Thus, Allen's delay in appealing the magistrate's ruling deprived the trial judge of his ability to effectively review the magistrate's holding. By analogy to this Court's holding in Renfro. Allen is now appealing the magistrate's decision directly to this Court, and, accordingly, we must dismiss this portion of Allen's appeal for lack of jurisdiction.

Next, Allen argues that he was entitled to .a judgment of acquittal because the superceding indictment was barred by the applicable statute of limitations. Allen maintains that the superceding indictment was filed more than five years after the conspiracy ended and did not relate back to the original indictment because it materially broadened the original charge. Specifically, Allen contends that the superceding indictment (1) increased the alleged amount of marijuana from 100 to 1,000 kilograms, thus increasing the maximum and mandatory minimum penalties Allen faced; and (2) sought forfeiture of an additional $600,000 in narcotics proceeds and proceeds from the lease agreement between Allen and Nextel. Finally, Allen asserts that Apprendi supports his statute of limitations argument because the superceding indictment increased the maximum penalty for the offense from 40 years' imprisonment to life.[1]

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[1] The government's contention that Allen waived his statute of limitations defense by failing to raise it prior to trial is without merit. See United States v. Nanar, 283 F.3d 1306, 1308 (11th Cir.), cert. denied, (U.S. Oct. 7, 2002) (No. 01-1816).

We review de novo a district court's denial of a defendant's motion for a judgment of acquittal. United States v. Pendergraft 297 F.3d 1198,1204 (11th Cir. 2002). We review for abuse of discretion a district court's denial of a defendant's motion for a new trial. Id. "A superceding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superceding indictment does not broaden or substantially amend the original charges." United States v. Ratcliff, 245 F.3d 1246, 1253 (11th Cir. 2001). The crucial inquiry is "whether approximately the same facts were used as the basis of both indictments." Id. at 1253 (explaining that, "[i]f the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him").

Allen concedes that the original indictment was timely filed. Thus, our determination hinges solely on whether the superceding indictment related back to the original indictment. The superceding indictment did not allege additional ventures or participants, and its allegations regarding the nature and duration of the conspiracy were identical to those contained in the original indictment. Although the superceding indictment increased the amount of drugs from "more than 100 kilograms" to "1,000 kilograms or more," the same facts were used as the basis of both indictments; thus. Allen does not demonstrate that the increase in the alleged quantity of drugs, alone, broadened the charges against him. See Ratcliff, 245 F.3d at 1253. Thus, we conclude that Allen was not entitled to a judgment of acquittal, or a new trial, based on the fact that the superceding indictment increased the amount of marijuana from 100 to 1,000 kilograms.

Additionally, Allen's reliance on Apprendi is misplaced. The Supreme Court held in Apprendi that, "[o]ther

than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Apprendi addressed the constitutionality of a statutory sentencing scheme, and it clearly is implicated when a defendant is sentenced beyond the statutory maximum penalty for his offense based on a fact that was not proved beyond a reasonable doubt. See id. We have held, however, that "Apprendi has *no effect* in cases in which a defendant's actual sentence falls *within the range* prescribed by the statute for the crime of conviction." United States v. Sanchez, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc) (emphasis in original), cert.denied. 122 S.Ct 1327 (2002). Thus, Allen is not entitled to relief under Apprendi because his 20-year sentence falls within the 40-year maximum penalty for his offense.

Finally, Allen's assertion that the superceding indictment subjected him to increased maximum and mandatory minimum penalties does not entitle him to relief because "[t]he potential for imposition of a greater penalty under a superceding indictment does not render such charges broader than those in the original indictment." United States v. Elliott, 849 F.2d 554, 561 (11th Cir. 1988). Similarly, the fact that the superceding indictment in this case expanded the forfeiture provision is of no consequence because criminal forfeiture is merely part of a defendant's sentence and, thus, cannot broaden the scope of a charged crime. See Libretti v. United States, 516 U.S. 29, 40-41, 116 S.Ct. 356, 363-64, 133 L.Ed.2d 271 (1995) (holding that criminal forfeiture is "punishment," not part of the substantive offense).

Next, Allen argues that the evidence presented at trial was insufficient to sustain the jury's forfeiture verdict because it did not establish a factual nexus between the offense and the State Road 44 property. Allen alleges that his home was not acquired with drug proceeds, and testimony from

witnesses who delivered money and marijuana to his property. (1) did not show that the deliveries were made while the conspiracy was ongoing, and (2) was inconsistent with testimony showing that no shed was located on the property.[2] Finally, Allen argues that the forfeiture of the State Road 44 property has Eighth Amendment implications because the value of the property was disproportionate to the gravity of the offense.

We review de novo whether the evidence was sufficient to sustain a defendant's conviction, viewing the evidence arid all reasonable inferences in the light most favorable to the government. United States v. Goldin Indus. Inc. 219 F.3dl271, 1278 (11th Cir.), cert. denied. 531 U.S. 1015 (2000). Any person convicted of a drug felony shall forfeit "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate, the commission of, such violation." 21 U.S.C. § 853(a)(2); United States v. Dieter. 198F.3d 1284, 1289 (11th Cir. 1999) (holding that the government must prove the elements of criminal forfeiture under § 853(a)(2) by a preponderance of the evidence), cert. denied. 531 U.S. 828 (2000). Criminal forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense. United States v. Bajakajian. 524 U.S. 321, 334, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314 (1998). However, if the value of the forfeited property is within the range of fines prescribed by Congress for the offense, "a strong presumption arises that the forfeiture is constitutional." United States v. 817 N.E. 29th Drive. Wilton Manors. Fla., 175 F.3d 1304, 1309 (11th Cir. 1999), cert. denied. 528 U.S. 1083 (2000).

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[2] Allen and Allen's wife testified that there was a large barn in the back of the property, but that it was unlikely that people would refer to the barn as a "shed." Allen's contention, that his and his wife's classification of the structure as a "barn" refutes Baxley's testimony that Allen stored marijuana in a "shed" on the State Road 44 property, is frivolous.

Even assuming the State Road 44 property was not acquired through drug proceeds, the government presented overwhelming evidence showing that it was used to facilitate the drug conspiracy. As discussed above, Baxley testified that, during the period alleged in the indictment, from 1989 through August 29, 1995, Allen (1) transported quantities of marijuana to the State Road 44 property to prepare it for delivery on several occasions, (2) stored between $80,000 and $100,000 in drug proceeds on the property, and (3) stored marijuana in a swamp buggy on the property on several occasions. On one occasion, Allen stored from 50 to 100 pounds of marijuana in the shed on the State Road 44 property. Also, according to Baxley, a tractor-trailer delivered marijuana to the State Road 44 property on one occasion. Hickman testified that, during the period alleged in the indictment, he normally received marijuana from Allen at his State Road 44 residence, and he saw Baxley's supplier, Chuy, at the house on two occasions. Also, on several occasions, Hickman delivered approximately $20,000 in drug proceeds to the State Road 44 residence. On one such occasion. Allen and his wife counted $50,000 in drug proceeds on the kitchen table. Finally, Delgado testified that, during the period alleged in the indictment, he (1) picked up drug money from Allen at his State Road 44 residence on two occasions, (2) delivered 100 pounds of marijuana to Allen at that residence on one occasion, and (3) delivered 50 pounds of marijuana to Allen at that residence on one occasion.Viewing the evidence in the light most favorable to the government, a reasonable jury could have found by a preponderance of the evidence that Allen used the State Road 44 property to facilitate the drug conspiracy.

Additionally, Allen is not entitled to relief on his contention that the forfeiture of his property was excessive. As noted above, the probation officer valued Allen's equity in his State Road 44 residence and 23-acre homesite at

$260,000. Because the value of the forfeited property was well within the range of fines prescribed by Congress for the offense, i.e., $4 million, we should presume that the forfeiture was constitutional. See 21 U.S.C. § 841(b)(1)(A) (providing a $4 million maximum fine for an offense involving at least 1,000 kilograms of marijuana); 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d at 1309. Also, in light of the evidence showing that Allen's offense involved thousands of pounds of marijuana, and hundreds of thousands of dollars in illegal drug proceeds, he cannot overcome the presumption that the forfeiture was not disproportionate to the gravity of the offense.

Next, Allen alleges for the first time on appeal that the forfeiture verdict was a nullity because the superceding indictment that gave rise to the forfeiture action was not timely filed. We need not address whether the forfeiture verdict was a nullity because this issue is moot. As noted above, Allen's contention that the superceding indictment was untimely is without merit.

Finally, Allen argues that he was entitled to a judgment of acquittal because a material variance existed between the indictment and the evidence presented at trial. Allen maintains that the evidence established at least four conspiracies to traffic in marijuana, rather than one conspiracy that continued through August 1995. Allen further contends that he was substantially prejudiced by this variance because it permitted the government to bootstrap his unrelated August 29, 1995, arrest with a small amount of marijuana to prove that the alleged conspiracy continued until that date.

A material variance between an indictment and the government's proof at trial occurs if the government proves multiple conspiracies under an indictment alleging only a single conspiracy. United States v. Aired, 144 F.3d 1405, 1414 (11th Cir. 1998). Whether the evidence established a single conspiracy is an issue of fact to be determined by the jury,

and "the arguable existence of multiple conspiracies does not constitute a material variance from the indictment if, viewing the evidence in the light most favorable to the government, a reasonable trier of fact could have found that a single conspiracy existed beyond a reasonable doubt." Id. In determining whether a reasonable juror could have found a single conspiracy, we consider (1) whether a common goal existed, (2) the nature of the underlying scheme, and (3) the overlap of participants. Id.

Here, while some of the co-conspirators, such as the Sillers, Stephens, Delgado, and Hickman, moved in and out of the conspiracy, Allen's role as a major distributor, and Baxley's close involvement with Allen's trafficking activities, remained constant throughout the conspiracy's duration. This, alone, is sufficient to prove that a single conspiracy existed. See United States v. Taylor, 17 F.3d 333, 337 (11th Cir.) (finding sufficient evidence of a single conspiracy where all three transactions had "the common hub of [one person] at their core"), cert. denied, 513 U.S. 950 (1994). In addition to showing that Allen was the "common hub" for several transactions, the government demonstrated a considerable overlap of participants. Significantly, (1) Baxley and Allen both received marijuana from the Sillers; (2) Stephen and Hickman received marijuana from both Baxley and Allen; and (3) the marijuana that Allen supplied to Baxley was obtained from the Sillers and, subsequently, Delgado.

Finally, in addition to showing that Allen was the "common hub" in a multi-transactional scheme to distribute marijuana for profit, the government's evidence was sufficient to prove that Allen and Baxley remained co-conspirators from 1989 through August 29, 1995. Allen contends that he "terminated his involvement in marijuana dealing with Baxley" prior to 1995, and his August 29, 1995, arrest was not linked in any way to the alleged conspiracy. However, Baxley testified at trial that Allen continued to

supply him with 10 to 20 pound quantities of marijuana after they had "split to some extent" in 1995. Viewing Baxley's testimony in the light most favorable to the government, a reasonable juror could have concluded that Allen's attempted delivery often pounds of marijuana to Baxley on August 29, 1995, the day of Allen's arrest, was made in furtherance of the conspiracy. Allen has failed to demonstrate that a material variance existed between the indictment and the government's evidence at trial.

For the foregoing reasons, we conclude that we lack jurisdiction to review the magistrate's order disqualifying Allen's retained counsel. We further conclude that (1) the superceding indictment related back to the original indictment and, thus, was timely filed; and (2) therefore, Allen's contention that the forfeiture verdict was a nullity is moot. We also conclude that the evidence presented at trial was sufficient to sustain the jury's forfeiture verdict. .Finally, we conclude that a reasonable juror could have found that Allen participated in a single conspiracy from 1989 through August 29, 1995. Thus, Allen's contention that a material variance existed between the indictment and the government's evidence at trial is without merit.

AFFIRMED.

APPX. 15
APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TERRY ALLEN,

Petitioner,

v. CASE NO. 6:03-cv-1803-Orl-28KRS
(5:00-crt-28-Orl-28KRS)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This case involves an amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 27). The Government filed a response (Doc. No. 29), a supplemental response (Doc. No. 32), and A second supplemental response (Doc. No. 34) to the amended section 2255 motion. Petitioner then filed a reply (Doc. No. 36) to the responses.

Petitioner alleges essentially two claims for relief in his motion: first, that he received ineffective assistance of counsel; and second, that he "was actually innocent of his conviction77 because there was insufficient evidence that he conspired to possess the amount of marijuana alleged in the indictment.

Procedural History

Petitioner was charged by indictment with conspiracy to distribute over 100 kilograms of marijuana (Criminal Case No. 5:00-crt-28-Ocr-28KRS, Doc. No. 1, filed July 19, 2000)[1]. On August 4, 2000, Mr. Clyde A. Taylor, Jr. entered a notice of appearance on behalf of Petitioner (Criminal Case Doc. No. 12). On January 17, 2001, Petitioner was charged by superseding indictment with conspiracy to distribute between 100 kilograms and 1,000 kilograms of marijuana (Criminal Case Doc. No. 37). On February 12, 2001, Harrison T. Slaughter, Jr. entered a notice of appearance on behalf of Petitioner (Criminal Case Doc. No. 47). The Government then filed a motion to disqualify Mr. Slaughter as Petitioner's counsel on the basis of a conflict of interest (Criminal Case Doc. No. 56, filed March 16, 2001). United States Magistrate Judge Gary R. Jones held a hearing on the motion and entered an order disqualifying Mr. Slaughter and his law firm from representing Petitioner (Criminal Case Doc. No. 86, filed June 22, 2001). On June 26, 2001, A. Brian Phillips entered a notice of appearance on behalf of Petitioner (Criminal Case Doc. No. 87).

The case proceeded to a jury trial, and Petitioner was found guilty as charged in the superseding indictment (Criminal Case Doc. No. 120, filed November 9, 2001). The Court adjudicated Petitioner guilty of conspiracy to distribute marijuana and sentenced him to imprisonment for a term of 240 months (Criminal Case No. 154, filed April 2, 2002).[2] Petitioner filed a direct appeal with the Eleventh Circuit Court of Appeals, which entered a written, unpublished

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[1]Hereinafter Criminal Case No. 5:00-crt-28-Ocr-28KRS will be referred to as "Criminal Case."

[2]The judgment was amended on two occasions to correct a clerical error and the amount of the special assessment (Criminal Case No. 5:00-crt-28-Ocr-28KRS, Doc. Nos. 178 and 180).

opinion affirming the conviction and sentence. *See* Criminal Case Doc. No. 201, filed February 6, 2003). Because Senior United States District Judge William Terrell Hodges had previously recused himself from the underlying criminal case, this case was reassigned to the undersigned.

Claim One

Petitioner avers that he received ineffective assistance of counsel because of the following: 1) Mr. Phillips failed to challenge the order disqualifying Mr. Slaughter; 2) Mr. Phillips failed to disclose a "significant conflict of interest"; 3) Mr. Slaughter and Mr. Taylor failed to object to Magistrate Judge Jones' order disqualifying Mr. Slaughter and his law firm; and 4) trial counsel and appellate counsel failed to "challenge the fact that petitioner was indicted for a new crime outside the statute of limitation."

1. *Legal Standard*

The Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984)/ established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the Strickland test requires that the defendant demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The second prong of the Strickland test requires the defendant to show that the deficient performance prejudiced the defense. Id. at 687.[3] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. Id. at 689-90.

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[3]In Williams v. Taylor, 529 U.S. 362,391 (2000), the Supreme Court discussed that to establish prejudice the petitioner must demonstrate that "there is a reasonable probability that but for

2. *Issues One and Three*

In issue one Petitioner argues that Mr. Phillips failed to file an objection to Magistrate Judge Jones' order disqualifying Mr. Slaughter. In issue three Petitioner contends that Mr. Slaughter and Mr. Taylor failed to file an objection to Magistrate Judge Jones' order disqualifying Mr. Slaughter. Petitioner claims that he was willing to waive any potential conflict of interest on the part of Mr. Slaughter.

On May 29, 2001, Magistrate Judge Jones held an evidentiary hearing on the Government's motion to disqualify Mr. Slaughter. The Government's request to disqualify Mr. Slaughter concerned an alleged statement made by Petitioner to Michael Baxley, who was a co-conspirator and alleged partner of Petitioner in distributing marijuana, in the presence of Mr. Slaughter at his law office. The Government alleged that Mr. Slaughter should be disqualified because Petitioner could have been required to call Mr. Slaughter as a witness to refute the testimony of Mr. Baxley. At the evidentiary hearing, the Government presented the testimony of Mr. Baxley, and both sides argued extensively with regard to the disqualification issue.

On June 22, 2001, Magistrate Judge Jones entered a written order granting the Government's motion for

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counsel's unprofessional errors, the result of die proceeding would have different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Quotation omitted) (citation omitted). However, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Id.

disqualification.[4] Magistrate Judge Jones concluded that there was a serious potential for conflict, that the conflict was not waivable, and that disqualification was the only measure to be implemented in order of protect the integrity and fairness of the trial.

At the evidentiary hearing, Mr. Baxley testified that Petitioner, in Mr. Baxley's presence, told Mr. Slaughter that they were "partners." (Transcript of Evidentiary Hearing at 9-10, 22.) Clearly, Mr. Baxley was to be one of the primary witnesses for the Government at trial. In order for Petitioner to refute Mr. Baxley's statements, it was likely he would need to call Mr. Slaughter as a witness. It is readily apparent that a conflict of interest arose in this case. See United States v. Locnscio, 6 F.3d 924,933 (2nd Cir. 1993), cert. denied, 511 U.S. 1070 (1994) (holding that "[a]n attorney acts as an unsworn witness when his relationship to Ms client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation.... Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question."). In addition, this conflict of interest could not be waived by Petitioner. See id. at 934 (finding that "|w]hen an attorney is an unsworn witness, however, the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the fact finding process is impaired. Waiver by the defendant is ineffective in curing the impropriety in such situations, since he is not the party

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"Magistrate Judge Jones orally granted the motion at the conclusion of a hearing on the Government's motion to revoke Petitioner's bond, which was held on June 11, 2001.

prejudiced."). Under the circumstances. Petitioner has failed to demonstrate that there was any reasonable basis upon which counsel could have raised an objection to Magistrate Judge Jones' order on the motion for disqualification. The Court finds that counsels' conduct with regard to these issues was reasonable and that Petitioner has not shown prejudice.

3. *Issue Two*

Petitioner avers that Mr. Phillips failed to disclose a "significant conflict of interest." According to Petitioner, Greg Miller, the law partner of Mr. Phillips, was a former Assistant United States Attorney and had been involved in the efforts to indict Petitioner on federal criminal charges.

The right to effective assistance of counsel encompasses the right to representation free from actual conflict with defense counsel. Lightbourne v. Dugger, 829 F.2d 1012,1022 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (footnote omitted). Therefore, to establish a Sixth Amendment violation, the petitioner must demonstrate both that an actual conflict of interest existed and that such conflict adversely affected the adequacy of his (or her) representation. Smith v. White, 815 F.2d 1401,1404 (11th Cir.), cert. denied, 484 U.S. 863 (1987); see also LoConte v. Dugger, 847 F.2d 745,755 (11th Cir.), cert. denied, 488 U.S. 958 (1988) ("an actual conflict of interest does not carry a per se presumption of prejudice, but a limited presumption. The defendant must establish two elements: first, an actual conflict of interest and, second, that the conflict of interest 'adversely affected' [her] counsel's representation.... [T]he limited presumption of prejudice implied by a conflict of

interest requires only a showing of an adverse effect."). The Eleventh Circuit Court of Appeals has stated as follows:

> [P]etitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party. This requires petitioner to make a factual showing of inconsistent interests and demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. Absent such a demonstration, the conflict remains hypothetical and cannot form a basis for relief.

Porter v. Singletary, 14 F.3d 554, 560-61 (11th dr.), cert. denied, 513 U.S. 1009 (1994) (quotation omitted) (citations omitted).

Petitioner has failed to demonstrate that an actual conflict of interest existed in this case. "Although the possibilities for actual conflicts are very real when attorneys 'switch sides' in a subsequent criminal case involving the same defendant, such conflicts do not automatically occur." Maiden v. Bunnell, 35 F.3d 477, 480-81 (9th Cir. 1994). There is no indication that Mr. Miller was involved in the case or that any confidential information he might have possessed would have worked to Petitioner's disadvantage. Any conflict is speculative at best.

Moreover, in the event that an actual conflict of interest did exist, the Court determines that Petitioner has not met the "adverse affect" (prejudice) prong; i.e., Petitioner has not shown that such a conflict of interest adversely affected

the adequacy of his representation. In sum, Petitioner has not met his burden of pointing to some aspect of Mr. Phillips' trial performance that was a likely adverse effect stemming from the alleged conflict of interest. Therefore, this issue must fail.

4. *Issue Four*

Petitioner asserts that trial counsel and appellate counsel failed to "challenge the fact that petitioner was indicted for a new crime outside the statute of limitation." According to Petitioner,"[o]n January 17,2001, a superceding indictment was returned well after the five year statute of limitation had expired."

The record reflects that Petitioner's appellate counsel thoroughly argued this matter on direct appeal. In fact, the Eleventh Circuit discussed this matter in detail in its written opinion and found that it was without merit. Petitioners appellate counsel's discussion of this matter was comprehensive, thorough, and well-argued. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. Cf. Thomas v. Scully, 854 F. Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by counsel clearly showed the thoroughness of counsel's work). The Court finds that appellate counsel's performance was not deficient and that Petitioner has not demonstrated prejudice.

The record also reflects that, at trial. Petitioner's trial counsel successfully argued that the statute of limitations defense should be incorporated into the jury instructions. See Doc. No. 146 at 107-11. Consequently, the Court finds that Petitioner has not demonstrated that trial counsel acted unreasonably with regard to this matter or that he sustained prejudice.

Claim Two

Petitioner avers that there was insufficient evidence that he "conspired to possess 1000 kilograms of marijuana".

"Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding." Mills v. United States, 36 F.3d 1052,1055 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995); see also Cross v. United States, 893 F.2d 1287, 1289 (11th Cir.) ("In a section 2255 federal habeas motion, a movant may not raise claims that were not presented on direct appeal unless he can show cause excusing his failure to raise the issues previously and actual prejudice resulting from the errors."), cert. denied, 498 U.S. 849 (1990); Greene v. United States, 880 F.2d 1299,1305 (11th Cir. 1989) ("In general, a defendant must assert an available challenge to a sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding."), cert. denied, 494 U.S. 1018 (1990). "When a defendant fails to pursue an available claim on direct appeal, it will not be considered in a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the alleged error." Mills, 36 F.3d at 1055; see also Greene, 880 F.2d at 1305 ("A defendant can avoid this procedural bar only by showing both cause for the failure to raise the claim on direct appeal and actual prejudice arising from that failure."). Alternatively, under the fundamental miscarriage of justice exception, when a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant relief in the absence of a showing of cause for the procedural default. Mills, 36 F.3d at 1055.

In the present case. Petitioner has not alleged or otherwise demonstrated cause or prejudice with regard to his failure to raise this claim on direct appeal. Likewise, Petitioner has neither alleged nor shown the applicability of the fundamental miscarriage of justice exception. The entire

record has been reviewed, and the Court concludes that Petitioner is unable to satisfy either of die exceptions to the procedural default bar. Therefore, Petitioner's failure to raise this claim on direct appeal constitutes a waiver and bars him from raising claim two in the instant proceeding.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 27, filed March 4, 2004) filed by Terry Allen is **DENIED**, and this case is **DISMISSED** with prejudice.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of the Court is directed to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Criminal Case Doc. No. 317, filed March 4, 2004) pending in case number 5:00-cr-28-Oc-28KRS.

DONE AND ORDERED in Chambers at Orlando, Florida this 20 day of October, 2004.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

Copies to:
psk 10/18
Terry Allen
Counsel of Record

APPX. 25
APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TERRY ALLEN,
Petitioner,

-vs- Case No. 6:03-cv-1803-Orl-28KRS
(Criminal Case No.: 5:00-cr-28-Oc-28KRS)

UNITED STATES OF AMERICA,
Respondent.

ORDER

Tills case is before the Court on the following motion:

MOTION:	**PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY (Doc. No. 42)**
FILED:	**January 10,2005**

THEREON it is ORDERED that the motion is DENIED.

Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 12 day of January, 2005.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

APPX. 26
APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.05-10222-G

TERRY ALLEN,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA,

Respondent-Appellee

Appeal from the United States District Court for the Middle District of Florida .

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

/s/ Joel F. Dubina

UNITED STATES CIRCUIT JUDGE

APPX. 27
APPENDIX E

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-10222-G

TERRY ALLEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before TJOFLAT and DUBINA, Circuit Judges.

BY THE COURT:

Appellant has filed a "Motion Asking That A Three Judge Panel Review A One Judge Order Denying Appellant's Application for a Certificate of Appealability," which is construed as a motion for reconsideration of this Court's order dated March 11, 2005, denying his motion for a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has

failed to make the requisite showing. See 28 U.S.C. § 2253 (c)(2);' Slack v. McDaniel, 529 U.S. 473. 478, 120S.Ct. 1595, 1600-01, 146 L.Ed,2d 542 (2000); see also Strickland v. Washington, 466 U.S. 668, 687,104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984); United States v. Fradv, 456 U.S. 152, 167-68, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982); Nyland v. Moore, 216 F.3d 1264,1265 (11th Cir. 2000) (holding that this Court will not consider issues raised for the first time on appeal).